Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

LEONARD JAWOROWSKI,

Petitioner,

–against–

NEW YORK CITY TRANSIT AUTHORITY, ALAN F. KIEPPER, as former President of New York City Transit Authority and LAWRENCE G. REUTER, as President of the New York City Transit Authority,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner is barred from pursuing a claim for damages pursuant to 28 USC Section 1983 for deprivation of civil rights by Respondents when Appellant's dismissal from employment by Respondent New York City Transit Authority by the Kings County, New York Supreme Court during an application to vacate an arbitration award pursuant to New York Civil Practice Law and Rules Article 75.

2. Whether Petitioner's right to due process of law was violated by Respondents causing him to be dismissed after twenty-four years and ten months of service to his employer.

THE PARTIES

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JURISDICTIONAL STATEMENT FOR THIS COURT

Jurisdiction for this Court is predicated upon issues affecting the due process clause of the Fourteenth Amendment of the United States Constitution and upon violation of Petitioner's rights protected by United States law, to wit, 42 USC § 1983.

The jurisdiction of this Court is invoked under 28 USC § 1343, to redress the deprivation under color of state law, statute, ordinance, regulation, custom and/or usage of a right, privilege or immunity secured to the Petitioner by the First and Fourteenth Amendments to the Constitution of the United States.

Jurisdiction for this Court is further predicated upon ground that the matter in controversy, exclusive of interest and costs, exceeds the sum or value of FIFTY THOUSAND DOLLARS ($50,000.00) (28 USC § 1331) in that as a consequence of the acts complained of, the Petitioner has been deprived of his pension after twenty four years and ten months of working for Respondent employer New York City Transit Authority.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

The following constitutional and statutory authorities are printed in the Appendix to this petition:

1. United States Constitution, Fourteenth Amendment, due process clause thereof.

2. 42 USC § 1983.

3. 28 USC § 1343.

No.

In the United States Supreme Court

OCTOBER TERM, 1998

LEONARD JAWOROWSKI,

Petitioner,

-v.-

NEW YORK CITY TRANSIT AUTHORITY, ALAN F. KEIPPER as former President of New York City Transit Authority, and LAWRENCE G. REUTER, as President of New York City Transit Authority,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner, Leonard Jaworowski, has petitioned this Court to review the determination of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, where the Second Judicial Department failed to uphold a stay of arbitration issued by order of the Court below it, while at the same time allowing Respondents to assert that their filing of a notice of appeal from that Ordered Stay in the Court below amounted to a stay of the stay.

The result of the stay of the stay permitted Arbitration to proceed forthwith despite the Petitioner having filed a lawsuit pursuant to Article 78 of New York's Civil Practice Law and Rules for the purpose of obviating the arbitration altogether and substituting a formal action at law to resolve the Petitioner's grievance against the Respondent over termination by Respondents of his employment after twenty four years and ten months, and just a week or so short of Petitioner's retirement.

Because Respondents prevailed in staying the stay of arbitration, Petitioner's Article 78 Lawsuit was rendered moot, the arbitration went forward, and it resulted in an order of dismissal from employment, resulting in the Petitioner being deprived of his pension. (Memorandum Decision of the Supreme Court of the State of New York, Kings County (Hutcherson, J.) dated May 23, 1996 in a proceeding pursuant to New York Civil Practice Law and Rules Article 75 to contest the finding of an arbitrator, the decision of Judge Hutcherson upholding the arbitrator's decision against Petitioner Jaworowski).

This Petition comes to the door of this Court because Respondent New York City Transit Authority dismissed Petitioner Jaworowski through a disciplinary process that violated Petitioner Jaworowski's constitutional rights and the disciplinary process was nonetheless upheld and/or facilitated by the New York State Supreme Court, Appellate Division, Second Department, by the Federal District Court for the Eastern District of New York (Order of Hon. Nina Gershon, USDJ, US District Court for the Eastern District of New York, dated September 16, 1998) and by the United States Court of Appeals for the Second Circuit (Summary Order of the United States Court of Appeals for the Second Circuit Dated June 4, 1999).

We petition this Court because the Petitioner had a choice of fora in which to redress his termination of employment. He could arbitrate, as called for by the collective bargaining agreement that covered the Petitioner by virtue of his union membership. Or, in the alternative, the Petitioner was not precluded from suing in New York State Supreme Court pursuant to Civil Practice Law and Rules (CPLR) Article 78 (an Article 78 Lawsuit) for deprivation of constitutionally protected rights to due process arising from the employer's proposed termination of the Petitioner with loss of pension benefits at issue.

The decisions of the Courts below effectively precluded the Petitioner from pursuing his Article 78 Lawsuit and forced him into arbitration. An Article 78 Lawsuit has the full formality of a lawsuit, including a transcribed record of testimony. The arbitration actually had, however, provided a transcribed record only at the discretion of an arbitrator, and the arbitrator exercised that discretion in refusing to permit a stenographer hired and actually produced by the Petitioner to attend and transcribe the arbitration.

Yet, the New York State Supreme Court, Kings County indeed issued an order staying arbitration. It was thus clear to at least one Justice that the issues required sorting out in order to preserve the due process rights of Petitioner Jaworowski.

This Petition also comes to the door of this Court because the Courts below have found that Petitioner Jaworowski was barred from further litigating his dismissal due to collateral estoppel. But the Courts below impermissibly confused the issues upon which their findings of collateral estoppel were grounded.

Petitioner Jaworowski brings to this Court the issue that in the Courts below, he vigorously litigated to oppose Respondent New York City Transit Authority's effort to dismiss him. Now he seeks redress for the due process rights he was deprived of in the process of litigating his dismissal. Since the issues of Petitioner Jaworowski's dismissal and the issues of the process of his litigation are different, collateral estoppel never applied, and the Courts below merely missed the distinction.

Petitioner Jaworowski seeks damages based upon deprivation of his civil rights pursuant to 42 USC § 1983 by Respondent New York City Transit Authority arising from procedural wrongs imposed upon Petitioner Jaworowski in the disciplinary proceedings leading to his dismissal from employment, in the absence of a stenographic record of the arbitration that resulted in his dismissal, and in the ultimate consequences that flowed from the procedural wrongs, namely dismissal of Petitioner Jaworowski after twenty four years and ten months on the job and loss of his pension.

Petitioner Jaworowski was appointed to employment with Respondent New York City Transit Authority in June, 1970. After twenty four years and ten month of employment, he was served with disciplinary charges for his alleged misappropriation of New York City Transit Authority (hereinafter, Transit Authority) property and with failing to properly record the time in which he arrived for work to begin his shift.

The charges were sustained through internal Transit Authority "step" hearings and the recommended penalty of dismissal was affirmed through two step hearings.

After the second "step" hearing, Petitioner Jaworowski was afforded the right to appeal the determination through a

lawsuit pursuant to Article 78 of the New York CPLR (an Article 78 lawsuit), the right to such Article 78 lawsuit being pursuant to New York Civil Service Law. Petitioner Jaworowski was also afforded the right to submit to binding arbitration as per the collective bargaining agreement between his union (Transit Workers Union, TWU) and management, i.e., Respondent Transit Authority.

Petitioner Jaworowski elected to appeal the "step 2" decision against him by means of an Article 78 lawsuit on ground that arbitrations conducted by Respondent Transit Authority had historically excluded the presence of a court reporter and thereby effectively precluded any meaningful review of the findings reached by an arbitrator because of the absence of a transcribed record of the arbitration.

On May 16, 1995, Petitioner Jaworowski commenced an Article 78 lawsuit with an Order to Show Cause with the New York State Supreme Court, Kings County. The request for the Order to Show Cause specifically referred to Petitioner Jaworowski's concern that, based on historical practice of excluding stenographers, an arbitration would deprive him of preserving any record for review by a Court. Petitioner Jaworowski's Order to Show Cause sought, among other relief, a stay of arbitration in order to permit the Kings County Supreme Court to hear and review Petitioner Jaworowski's case in the Article 78 lawsuit.

On May 16, 1995, Kings County Supreme Court Justice Joseph S. Levine thereupon ordered that arbitration, already scheduled to take place May 18, 1995 at 12 noon, was stayed pending the May 19, 1995 return date of the Order to Show Cause.

However, on May 17, 1995, one day before the stayed, but scheduled arbitration, and two days before the return date

of the Judge Levine's Order to Show Cause in Kings County Supreme Court, Respondent Transit authority represented to counsel for Petitioner Jaworowski that they had obtained an automatic stay of Judge Levine's stay of arbitration by virtue of serving a Notice of Appeal from Judge Levine's May 16, 1995 Order staying the scheduled arbitration.

However, this representation was false and misleading in that the Civil Practice Law and Rules of New York required Respondent Transit Authority to procure leave to appeal from the Order since the Order that Transit Authority was appealing constituted an interim order.

Petitioner Jaworowski moved the Appellate Division, Second Department on May 18, 1995 by Order to Show Cause to resolve the issue of the alleged stay, and on the issue of whether Respondent Transit Authority had successfully stayed the Order of Supreme Court Justice Levine of May 16, 1995 which had indeed stayed the arbitration scheduled by Respondent Transit Authority for May 18, 1995.

Respondent Transit Authority appeared at the Appellate Division, Second Department and learned that they had not stayed the Kings County Supreme Court Order of Judge Levine which stayed arbitration - thus leaving Judge Levine's stay of arbitration in place. Respondent Transit Authority then attempted to serve Petitioner Jaworowski's counsel with a Notice of Intention to Appeal and again insisted that this indeed stayed the Supreme Court Stay. However, this notice had never been filed with the court below, not had it been served with the clerk of the Appellate Division.

Respondent Transit Authority further represented to Petitioner Jaworowski that the arbitration would be held whether Petitioner Jaworowski appeared or not, regardless of the existence of a Supreme Court stay of arbitration.

The Appellate Division refused to rule on the issue of the stay on May 18, 1995, i.e., whether Respondent Transit Authority had stayed the Order staying arbitration, and instead marked the issue for a return date eight days later. The Appellate Division refused to issue a further stay of arbitration on grounds that the Supreme Court had already stayed the same.

In light of the foregoing, Petitioner Jaworowski appeared at the arbitration, and again, Petitioner Jaworowski served the Supreme Court Order staying arbitration upon Respondent Transit Authority and upon the arbitrator.

Petitioner Jaworowski moved for the following relief prior to the commencement of the arbitration proceeding:

a) To adjourn the arbitration to permit the Kings County Supreme Court to rule on the issue of whether a stay existed or not since the issue of the stay involved complex New York procedural law, and since the arbitrator was not admitted to practice as attorney in New York and did not possess requisite procedural expertise to rule on this issue; and

b) That the court reporter that Petitioner Jaworowski hired and produced at the arbitration be permitted to record all preliminary issues, such as the issue of the Kings County Supreme Court Stay, as well as the arbitration itself. Petitioner Jaworowski represented that neither Respondent Transit Authority nor Petitioner Jaworowski's union would be obligated for any costs associated with the court reporter.

Petitioner Jaworowski pointed out that no prejudice would accrue from an adjournment of arbitration to permit the Kings County Supreme Court to rule on the issue of the stay since an adjourn date had already been scheduled by Respondent

Transit Authority the following week, which adjourn date fell in advance of Petitioner Jaworowski's anticipated date of retirement. Thus, the potential prejudice of adjourning the arbitration to permit the Kings County Supreme Court to rule, i.e., that Petitioner Jaworowski might retire in the interim, was not present here.

The impartial arbitrator ruled that the court reporter nonetheless was excluded from all proceedings and that the arbitration would proceed forthwith. The arbitration was thereupon conducted absent any court stenographer and Petitioner Jaworowski was found guilty on all counts through an "interim" decision that was rushed within days of the arbitration.

The charges at issue arose out of Respondent Transit Authority's contention that Petitioner Jaworowski misappropriated Transit Authority property and that Petitioner Jaworowski falsified time records regarding the time of arrival. Although Petitioner Jaworowski had been precluded from demonstrating unequivocally that the arbitrator's findings are not supported by the evidence presented by the exclusion of a court stenographer, his affidavit which was based on his recollection, notes and attorney notes was submitted in opposition to the motion of Respondent Transit Authority, proves that the findings of the arbitrator were not supported by the evidence presented.

With regard to the charges arising out of Petitioner Jaworowski's alleged falsification of time records, case of Respondent Transit Authority hinged upon the following:

a) Petitioner Jaworowski had in fact traveled to work on the night that he was under surveillance;

b) Petitioner Jaworowski's vehicle was allegedly observed entering the New Jersey side of the Holland Tunnel en route to New York City *after* 10:00 PM.

However, on cross-examination, the witness of Respondent Transit Authority acknowledged the following:

a) that they had no notes, memoranda, affidavits, tapes, video tapes or photographs to support their allegations that they observed Petitioner Jaworowski reporting to the work location after 10:00 PM.

b) That no individual actually observed Petitioner Jaworowski reporting to work after 10:00 PM.

c) That one of the witnesses of Respondent Transit Authority, an investigator VINCENT CANNIZARO, was impeached by the introduction of photographs that showed that the vehicle in which Petitioner Jaworowski was observed to be riding while he was en route to New York City possessed heavily tinted windows and could not be looked through during non-daylight hours when the observation of Petitioner Jaworowski allegedly occurred. In point of fact, the witness was so thoroughly impeached that Respondent Transit Authority's counsel attempted to rehabilitate the witness by volunteering that the witness might have seen Petitioner Jaworowski through an open window in the vehicle, to which query, the witness reluctantly admitted that this did not occur.

Petitioner Jaworowski further offered testimony that showed he could not have attempted to sign in to work *after* 10:05 PM since the sign-in book is routinely removed at 10:05 PM of each night as per Supervisor HOWARD

WORTHINGTON III. Supervisor WORTHINGTON was in charge of maintaining the log book.

With regard to the charges that Petitioner Jaworowski had possession of Transit Authority property without authority, Petitioner Jaworowski proffered the testimony of New York City Transit Authority Superintendent JAMES CARPINO. Superintendent CARPINO testified that he was a testy-six year veteran of the New York City Transit Authority and that T.A. equipment and property may be borrowed by employees and taken away from the work site when it was not being used, to discourage theft. The procedure involved signing out the equipment and to have the same approved by a supervising employee.

Superintendent CARPINO testified that the equipment at issue was signed out by one EDWARD SARTORIS who was an acting Superintendent, and duly authorized and approved to sign out the equipment.

Petitioner Jaworowski had taken possession of a Transit Authority Cement Mixer and other tools. However, Superintendent CARPINO testified that other heavy equipment such as compressors and cement mixers had been borrowed, and returned without incident.

Superintendent CARPINO acknowledged that Petitioner Jaworowski had not committed any misconduct so long as the equipment at issue was signed out, approved, maintained and returned properly.

That as a result of the foregoing, Petitioner Jaworowski successfully interposed an affirmative defense to the charge that he was in possession of Transit Authority property *without authorization.*

Notwithstanding the foregoing, the arbitrator sustained all charges and recommended the penalty of dismissal for Petitioner Jaworowski, and Respondent Transit Authority ultimately implemented this penalty.

As a result of the dismissal, Petitioner Jaworowski, who had been an employee for twenty-four (24) years and ten (10) months, with an excellent disciplinary record, and without any related charges curing his career, was terminated from his employment, and deprived of a considerable lifetime pension *just five days prior to retirement.*

Clearly, the evidence presented to the arbitrator demonstrated that Respondent Transit Authority had permitted tools and equipment to be borrowed and used by employees for a long time prior to the incident at issue. Thus, the evidence presented by Petitioner Jaworowski should have served as an affirmative defense or at least served in mitigation when implementing a penalty. Moreover, even if Petitioner Jaworowski did in fact inaccurately report his arrival time on the attendance sheet, this, when coupled with the other charge, did not justify the draconian penalty termination from employment five days before retirement from a career of twenty four years and ten months.

As set forth in his affidavit in opposition, Petitioner Jaworowski contends that Respondent Transit Authority's motivation for finding him guilty of misconduct and dismissing him "at all costs", even while depriving him of procedural and substantive due process of law, was to facilitate the removal of a top overtime earner within the New York City Transit Authority. In short, Petitioner Jaworowski had worked at Respondent Transit Authority's "Capital Improvement Project" at West Fourth Street, New York, in the year preceding his dismissal and in the year preceding his

retirement and was ranked within the top five (5) percent of all overtime wage earners within the Authority.

During the last twelve (12) calendar months prior to his dismissal and anticipated retirement, Petitioner Jaworowski had earned approximately $110,000.00 which amount represented an increase of almost 300% of Petitioner Jaworowski's base salary. This constituted an embarrassment and a potential pension liability for Respondent Transit Authority in that Petitioner Jaworowski was due to receive the sum of approximately $55,000.00 for the rest of his life under the existing pension agreement, which sum represented approximately $36,000.00 more per year than a pension based upon Petitioner Jaworowski's base salary alone.

In August, 1995, Petitioner Jaworowski filed a Petition under Article 75 of the New York Civil Practice Law and Rules which sought to vacate the penalty of dismissal awarded by the arbitrator against Petitioner Jaworowski based upon the fact that the arbitration award lacked a rational basis. The foregoing issues of (1) Denying Petitioner Jaworowski a stenographic record; and (2) Violating the Kings County Supreme Court Order were raised in the Appellant's Petition with other facts to support his contention that the decision lacked a rational basis.

The Kings County Supreme Court denied Petitioner Jaworowski's Article 75 petition in its Decision and Order of May 23, 1996. Petitioner Jaworowski then commenced an action in the District Court of the United States for the Eastern District of New York seeking relief pursuant to 42 USC § 1983 alleging that deprivation of a stenographic record and violation of a New York Supreme Court Order staying arbitration violated his rights to due process of law.

Respondent Transit Authority appeared and joined issue and eventually moved for summary judgment on ground of collateral estoppel, i.e., that the issues raised in the Federal Lawsuit had previously been litigated in the Kings County Supreme Court, and thus could not be relitigated under the doctrine of collateral estoppel.

In its Order of September 16, 1998, the U.S. District Court dismissed Petitioner Jaworowski's federal lawsuit with prejudice. Petitioner Jaworowski then appealed to the United States Court of Appeals for the Second Circuit and was similarly unsuccessful.

REASON FOR GRANTING THE WRIT

I.

SINCE THE STANDARDS OF REQUIRED PROOF DIFFER AS BETWEEN AN ACTION BROUGHT IN A UNITED STATES DISTRICT COURT AND A NEW YORK STATE ARTICLE 75 PROCEEDING, PETITIONER JAWOROWSKI DID NOT HAVE IDENTICAL ISSUES LITIGATED IN BOTH PLACES AND HENCE SHOULD NOT BE COLLATERALLY ESTOPPED FROM LITIGATING HIS DEPRIVATION OF RIGHTS TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION.

While Petitioner Jaworowski is but an individual, when the least of us cannot rely on the proper administration of justice, then there is no justice. While we do not claim original authorship of the foregoing formulation nor are we able to properly attribute it, Petitioner Jaworowski nonetheless invokes its succinct message.

Petitioner Jaworowski should not be collaterally estopped from litigating the issues raised in this lawsuit by virtue of his New York State Court Article 75 lawsuit to vacate an unfavorable arbitration award. Petitioner Jaworowski was not provided with a full and fair opportunity to litigate the federal issues. The standard of proof for a Petitioner in a New York Article 75 proceeding is to show that the arbitrator's decision was inherently irrational. This standard is far higher than the standard required of a plaintiff in a federal civil action, namely, that it was more likely than not that Petitioner Jaworowski suffered constitutional deprivations.

In its motion for summary judgment, Respondent Transit Authority attempted to argue that the issues raised in the instant lawsuit, i.e., deprivation of due process of law, had

already been litigated in State Supreme Court and that thus, Petitioner Jaworowski was precluded from relitigating these issues in Federal Court under the doctrine of collateral estoppel. The United States District Court and the U.S. Court of Appeals for the Second Circuit adopted this argument and granted summary judgment and affirmed it, respectively.

However, the issues raised in New York State Court are not identical to the issues raised in the instant federal lawsuit. Petitioner Jaworowski's application in his Article 75 lawsuit to vacate the Arbitration Award of dismissal from employment in New York State Court was argued on the ground that the award was inherently irrational or that it lacked a rational basis. *Garcia v. Fed. Ins. Co.,* 46 N.Y.2d 1040; *In re Petrofsky (Allstate Insurance Company),* 54 N.Y.2d 207.

While the constitutional issues discussed in this case were raised during the State proceeding, the State Supreme Court was permitted to inquire as to whether the decision of the Arbitrator lacked rational basis in light of the constitutional deprivations among other considerations. For example, the State application sought to vacate the arbitrator's award on grounds including an absence of proof; lack of discovery or disclosure; and severity of the penalty of dismissal that was implemented.

In the case at bar, the issue is not whether the arbitration award was inherently irrational. Instead, the issue is whether Respondent Transit Authority violated Petitioner Jaworowski's constitutional rights through the following misconduct:

a) By precluding Petitioner Jaworowski from preserving a stenographic record of the proceedings of the arbitration. The proceedings were patently unfair and devoid of any substantial evidence to support the arbitrator's findings. Further, the arbitration proceedings were conducted solely for the purpose of eliminating an embarrassing political situation, namely that the excessive amount of overtime pay that had been earned by Petitioner Jaworowski. Respondent Transit Authority sought to clear its problem with a "Star Chamber" proceeding by preventing Petitioner Jaworowski from having any meaningful chance for a review of the arbitrator's determination.

b) By ignoring the Kings County New York Supreme Court stay of arbitration and by following through with an arbitration even though the issue of the stay was returnable on the very next day before the Kings County Supreme Court, and even though an alternate date for the arbitration had already been scheduled by Respondent Transit Authority, which date fell well ahead of Petitioner Jaworowski's anticipated retirement date.

c) By pre-empting Petitioner Jaworowski's right to proceed with a New York State Article 78 lawsuit which was already filed and pending in Kings County Supreme Court, particularly since the Kings County Court had acknowledged the Article 78 lawsuit was proper since the Court had signed an order staying arbitration and granted a return date to litigate the issue of whether arbitration should be stayed permanently thus permitting Petitioner Jaworowski to proceed with his Article 78 lawsuit.

The United States Court of Appeals for the Second Circuit has found that, for a state court judgment to have preclusive effect upon a federal lawsuit seeking relief pursuant to 42 USC § 1983, two requirements must be met,

> First, the party must have had a full and fair opportunity to contest the decision said to be dispositive of the present controversy. . . . Second, the issue *must be identical to the issue in the prior action.*

LaRocca v. Gold, 662 F.2d 144 (2d Cir. 1981) emphasis added.

Here, the issue before the New York State Court, i.e., whether or not the decision of the arbitrator was inherently irrational in light of the constitutional deprivations pursuant to New York Civil Practice Law and Rules § 7511(b) is not identical to the issues in the instant federal lawsuit, i.e., whether Petitioner Jaworowski can prove by a preponderance of the evidence that Respondent Transit Authority violated his right to due process of law.

The issue of whether the arbitrator's award was inherently irrational compared to the very different issue of whether constitutional deprivations occurred must not be allowed to preclude Petitioner Jaworowski from having his day in court. Clearly, the issue of inherent irrationality of an arbitrator's award raised in the Article 75 State Court proceeding is *not* identical to the issue of constitutional deprivation of due process raised in the federal lawsuit seeking redress under 42 USC § 1983.

II.

PETITIONER JAWOROWSKI PLEADED AND SOUGHT TO PROVE THAT RESPONDENT TRANSIT AUTHORITY VIOLATED HIS RIGHT TO DUE PROCESS OF LAW.

Petitioner Jaworowski has not only been deprived of the salary and status that accompanies his employment position, i.e., his property right as a fully tenured civil servant, but he was also deprived of his pension entitling him to receive approximately $55,000.00 per annum until the time of his death. Petitioner Jaworowski was employed with Respondent Transit Authority for twenty-four (24) years and ten months prior to his dismissal. He was ready to retire in one (1) week's time when his dismissal was effectuated.

A. PROCEDURAL DUE PROCESS VIOLATIONS

Respondent Transit Authority violated Petitioner Jaworowski's right to due process of law by depriving him of the opportunity to transcribe the arbitration proceedings, *even though Petitioner Jaworowski provided a court stenographer at his own expense.*

In the proceedings below, Respondent Transit Authority was unable to cite to any authority permitting this constitutional deprivation. In fact, the collective bargaining agreement provision that discusses the arbitration requirements and procedures merely states that management (Respondent Transit Authority) is not *required* to transcribe the proceedings. *The collective bargaining agreement does not override or amend New York Civil Service law*, i.e., that due process requires that a litigant in an administrative hearing is entitled to a transcript of the proceedings.

The deprivation of Petitioner Jaworowski's constitutional right to transcribe the proceedings is especially grievous since he was indeed a fully tenured civil servant. New York's state courts have clearly determined that due process requires that a litigant in an administrative proceeding be entitled to a transcript of the proceedings. See *Matter of Newbrandt v. City of Yonkers*, 285 N.Y. 164, 33 N.E.2d 75; *Matter of Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E.2d 421; *Matter of Sowa v. Looney*, 23 N.Y.2d 329, 296 N.Y.S.2d 760, 244 N.E.2d 243.

In fact, New York's appellate courts have held that if no transcript is available to the parties since no stenographer was used, the court may simply "throw up its hands, and remand the case for a whole new trial." See Siegel, *New York Practice*, Second Ed., p. 846; *Ernest LL v. Rosemary LL*, 50 A.D.2d 706, 375 N.Y.S.2d 495.

Here, the absence of a stenographic transcript was caused entirely through the *objection of Respondent Transit Authority since Petitioner Jaworowski retained and actually produced a stenographer at the arbitration.* The intentional deprivation of preserving a record in order that the proceedings might be reviewed creates, in and of itself, a compelling ground to overturn his dismissal and return him to his position with Respondent Transit Authority. Moreover, absent any civil service considerations, but entirely on practical grounds, the inadequacy of a record for review when a transcript was specifically requested is grounds to vacate an arbitration award.

Petitioner Jaworowski's lawsuit also seeks to redress Respondent Transit Authority's intentional disobedience of a Kings County Supreme Court mandate staying arbitration pending the return date of an Order to Show Cause to resolve the issue of whether Petitioner Jaworowski could proceed to

challenge his dismissal though a State Supreme Court Article 78 proceeding in lieu of arbitration. Respondent Transit Authority proceeded forward with arbitration in full violation and contravention of the court order, so as to dispense swift self-serving "justice" before the Kings County Supreme Court could decide whether to permanently stay arbitration and to permit Petitioner Jaworowski to proceed with an Article 78 lawsuit.

B. SUBSTANTIVE DUE PROCESS VIOLATIONS

Petitioner Jaworowski has also sought to redress the absence of substantive due process in that the evidence presented by Respondent Transit Authority did not sustain the two charges filed against him. Petitioner Jaworowski successfully and completely rebutted any inference that he converted the property of Respondent Transit Authority by proferring testimony from a twenty-six (26) year veteran, Superintendent JAMES CARPINO, who testified that Petitioner Jaworowski was properly and lawfully in possession of tools and equipment by virtue of the authority of an acting Superintendent, and that both of them were loaned out when not in use, and were signed out by Petitioner Jaworowski. Appellant further punched holes in the second set of charges regarding Petitioner Jaworowski's alleged falsification of time keeping records in order to "pad" his overtime.

However, the ability of Petitioner Jaworowski to attack the insufficient evidence against him was severely prejudiced by Respondent Transit Authority when it knowingly and intentionally excluded a stenographer from the arbitration, and thereby created a "star chamber" situation wherein Petitioner Jaworowski's ability to obtain a judicial review on substantive grounds was severely prejudiced.

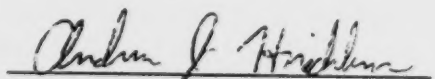
Nonetheless, Petitioner Jaworowski was capable of setting forth the substantive due process violations by giving affidavit testimony regarding the proceedings from his own recollections and from his own notes and from his attorney's notes in support of his substantive due process claims.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Dated: Rosedale, New York
August 27, 1999

Respectfully submitted,



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APPENDIX A

Memorandum Decision of the Supreme Court of the State of New York, County of Kings (Hutcherson, J.) dated May 23, 1996

SUPREME COURT: KINGS COUNTY

In the Matter of the Application of LEONARD JAWOROWSKI,	TRIAL TERM, PART 25
Petitioner(s),	By: Hutcherson, J.
vs.	Index No. 27172/95
NEW YORK CITY TRANSIT AUTHORITY, CARMEN SUARDY, as Vice President of labor Relations and ALAN F. KIEPPER, President of the New York City Transit Authority, Respondent(s).	

In this Article 75 proceeding petitioner moves for a judgment pursuant to CPLR section 7511 vacating and setting aside the arbitration award dated May 22, 1995.

Respondent counterclaims pursuant to CPLR §7511[e] for an Order confirming the May 22, 1995 arbitration award.

Petitioner was appointed as a Maintainer's Helper June 8, 1970, with the New York City Transit Authority. On April 28, 1995, he was suspended without pay pending termination due to allegations that he falsified his arrival sheet and misappropriated Transit Authority property.

The parties proceeded through the disciplinary action pursuant to the Transit Authority's Collective Bargaining Agreement (hereinafter "CBA") with the petitioner's union the Transport Workers Union, Local 100 (hereinafter "TWU").

The petitioner grieved the disciplinary action and concurrently filed for retirement with the New York City Employees Retirement System effective May 27, 1995.

The charges and dismissal penalty were sustained through the internal step hearings.

The petitioner subsequently commenced an Article 78 proceeding on Tuesday, May 16, 1995, in order to appeal the recommended findings and penalty of termination. Petitioner sought and obtained a stay of the Tripartite Arbitration Board hearing scheduled for May 18, 1995.

Respondent appealed the Show Cause Order the following day, May 17, 1995 and notified opposing counsel by faxed letter that the appeal restrained the stay and allowed the arbitrator to proceed on May 18, 1995. Respondent served a Notice of Intention to seek leave to appeal.

In response, petitioner moved for a stay in the Appellate Division, Second Department, but that portion of the Order to Show Cause which sought to rescind the stay which restrained the stay of the May 15, 1995 arbitration proceeding was struck. The Order to Show Cause which sought to vacate the automatic stay obtained by respondent-appellant by virtue of their appeal from the Order of May 16, 1995, was made returnable on May 25, 1995.

The parties appeared on May 18, 1995 for the arbitration at which time the arbitrator allowed the arbitration hearing to proceed despite petitioner's representations that a stay was in

effect. The arbitrator also denied petitioner's application to transcribe the proceedings.

The Tripartite Arbitration Board completed petitioner's hearing on May 18, 1995 and thereafter issued an Interim Award and then Final Award, both dated May 22, 1995, which sustained by majority vote the decision to suspend and terminate the petitioner. Petitioner had been scheduled to retire on May 27, 1995.

Petitioner brings this petition to vacate and set aside the award upon the grounds of:

1. Absence of Authority to arbitrate as per the mandate of the Kings County Supreme Court issued prior to the arbitration;

2. Absence of stenographic record to review decision, in violation of petitioner's Civil Service due process rights guaranteed under State and Federal Constitutions, section 75 of the New York State Civil Service Law and under New York case law, even though petitioner appeared at the arbitration with a court reporter at his own expense; and

3. Partiality of the arbitrator.

After oral argument and due deliberation and consideration and based upon the foregoing papers, petitioner's application to vacate and to set aside the award of the arbitrator is denied and respondent's counterclaim to confirm the award is granted for the reasons stated below.

An arbitrator's award will not be set aside unless it is violative of a strong public policy, is totally irrational, or exceeds the arbitrator's power CPLR 7511[b] *Matter of Town of Callicoor [Civil Serv Employees Assn],* 70 NY2d 907;

Matter of Mohiuddin v. Khan, 197 AD2d 578; *Matter of Akers v. New York City Transit Auth,* 172 AD2d 749, 751.

Petitioner's allegation that the arbitrator was obligated to adjourn the arbitration pending the court's determination and the request for a stay is without merit. Granting or refusing an adjournment lies within the discretion of the arbitrator *Reele v. B. Healy NY Corporation,* 54 AD2d 1039, and petitioner has failed to demonstrate that denial of the adjournment amounted to misconduct. Moreover, in this instance where the CBA provides that "No transcript of arbitration hearing shall be required", it was within the arbitrator's discretion not to allow stenographic transcription of the hearing. See, *Rhinestone v. New York City Transit Authority,* 142 AD2d 562; *Reele v. B. Healy NY Corporation, supra.*

Petitioner also challenges the award based upon the alleged partiality and bias of the impartial arbitrator. Petitioner alleges that the impartial arbitrator was at one time employed by the Metropolitan Transportation Authority and the Long Island Railroad. The respondent asserts that in 1989, the impartial arbitrator was an independent contractor serving as a Hearing Referee to hear disciplinary cases pursuant to New York Civil Service Law, section 75 involving the Transit Authority and non-TWU represented employees.

It is asserted that he was selected to hear petitioner's arbitration pursuant to the CBA which provides for such selection on a rotating basis from a panel of mutually agreed chairpersons.

Partiality may be shown by actual bias or the appearance of bias from which a conflict of interest may be inferred. . . Generally, before entering upon their duties, arbitrators should disclose any relationship direct or indirect that they have with any party to the arbitration, and disclose all facts known to

them which might indicate any interest or create a presumption of bias. . .while this rule does not require an arbitrator to disclose insignificant conflicts with the parties before him. . . it does require that any substantial relationship be revealed. . . [citations omitted] *City School District of Oswego v. Oswego Classroom Teachers' Association,* 100 AD2d 13. If the parties so agree, the relationship of an arbitrator to the party selecting him or to the matters in dispute will not disqualify him *See, Siegel v. Lewis,* 40 NY2d 487, 690. Here, the impartial arbitrator was agreed upon by both the union and the NYCTA. Moreover, the arbitrator's past conduct with the respondent is insufficient to support a finding of bias or partiality.

Finally, petitioner asks that the award be vacated because the sanction of termination is too harsh. However, where the parties have agreed to arbitration, a Court may not usurp the arbitrator's function by imposing its concept of a just and equitable result *Matter of Board of Education at the Dover Union Free School District v. Dover Wingdale Teachers' Association,* 95 AD2d 497.

Here, it cannot be held that the award was irrational, violative of public policy or in excess of the arbitrator's powers.

Accordingly, petitioner's application to vacate the arbitration award is denied and respondent's cross-motion to confirm the award is granted.

This constitutes the Decision and Order of the Court.

ENTER

James W. Hutcherson, J.S.C.

APPENDIX B

Order (Gershon, J.) of the United States District Court, Eastern District of New York Dated September 16, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEONARD JAWOROWSKI,

Plaintiff,

ORDER
96 CV 5142(NG)

-against-

NEW YORK CITY TRANSIT AUTHORITY, ALAN F. KIEPPER, as former President of New York City Transit Authority, and LAWRENCE REUTER, as President of New York City Transit Authority,

Defendants.

GERSHON, United States District Judge:

Plaintiff Leonard Jaworowski brings this action pursuant to 42 U.S.C. § 1983, alleging violations of his rights to due process and equal protection of the laws with regard to a May 18, 1995 arbitration hearing and May 22, 1995 arbitration award that upheld his termination from the New York City Transit Authority ("Transit Authority"). Defendants, Transit Authority, Alan F. Kiepper, as former President of the Transit Authority and Lawrence Reuter, as present President of the Transit Authority, move to dismiss the complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that plaintiff's previous action pursuant to New York

Civil Practice Law and Rules ("CPLR") Article 75 bars this action, and that the individual defendants, Kiepper and Reuter, are entitled to qualified immunity.

BACKGROUND

The following facts are undisputed.[1] Plaintiff had worked for the Transit Authority since June 8, 1970, most recentiy as a "Structure Maintainer" for the Infrastructure Division of the Subways Department. On April 28, 1997, the Transit Authority notified plaintiff of his suspension without pay pending termination because of allegations that he falsified his arrival time record on April 20, 1995 and that he had unauthorized possession and control of a Transit Authority cement mixer as well as other Transit Authority property such as an impact wrench and a "demo hammer." Plaintiff appealed this disciplinary action pursuant to the collective bargaining agreement between plaintiff's union and the Transit Authority. That agreement provided plaintiff a multi-step administrative appeal process. Plaintiff also filed for retirement with the New York City Employees Retirement system, to be effective May 27, 1995.

The Step 1 meeting resulted in a May 1, 1995 decision sustaining the disciplinary charges and penalty of suspension and termination. Plaintiff appealed this decision, which was sustained at the Step 2 meeting. On plaintiff's further appeal, a hearing before the Tripartite Arbitration Board, the last step in the administrative process, was scheduled for May 18, 1995.

Two days before the scheduled hearing, plaintiff commenced a proceeding pursuant to CPLR Article 78 seeking to appeal the Step 2 decision and, in the interim, stay the final arbitration hearing of the Tripartite Arbitration Board. On May

---

[1] By agreement, there has been no discovery in this case.

16, 1995, the Supreme Court, Kings County (Levine, J.), signed plaintiff's Order to Show Cause and stayed the arbitration hearing scheduled for May 18, 1995. The next day, defendants filed a Notice of Appeal of that Order. Defendants, in a May 17, 1995 letter, informed plaintiff that their Notice of Appeal "stays the appealed order. . .and thus any effect which attached to Justice Levine's order has now been stayed." The letter continued:

> Consequently, the Transit Authority will proceed at tomorrow's scheduled Tripartite Arbitration Board hearing regarding Mr. Jaworowski's disciplinary charges. Mr. Jaworowski and his representative(s) are expected to appear, at the arbitration hearing. . . The Transit Authority will proceed even in Mr. Jaworowski's absence, and if he does not appear then the charges will be sustained and the appealed dismissal penalty implemented pursuant to the collective bargaining agreement.

On the morning of May 18, 1995, the date of the scheduled arbitration hearing, the parties appeared at the Appellate Division, Second Department, in order to resolve the issue of whether defendants' Notice of Appeal stayed the effect of the May 16, 1995 Order which stayed the arbitration hearing scheduled for later that day. Defendants served a handwritten Notice of Intention to Appeal the May 16, 1995 Order, and plaintiff filed another proposed Order to Show Cause with the Appellate Division, seeking again to stay the May 18, 1995 arbitration hearing. Justice Thomas P. Sullivan of the Appellate Division, Second Department, signed the Order to Show Cause "why an order should not be made vacating the automatic stay obtained by respondents-appellants by virtue of their appeal from the order of May 16, 1995" and expressly denied plaintiff's request to the Appellate Division

for a stay of the May 18, 1995 Tripartite Arbitration Board hearing.

The Tripartite Arbitration Board hearing proceeded later that day at 2:00 p.m. Plaintiff, appearing with counsel, presented the Board with the May 16, 1995 Order of Justice Levine and requested an adjournment of the arbitration hearing until the May 19, 1995 return date of that Order for the purpose of determining whether a stay of the proceeding existed. The request for an adjournment was denied. Plaintiff also requested that a stenographer, whom he had already procured at his own expense and was present, be allowed to transcribe the proceedings. This request was also denied.

The hearing was then held. Plaintiff, represented by counsel, cross-examined witnesses of the Transit Authority and presented witnesses of his own. On May 22, 1995, the Tripartite Arbitration Board issued an Interim Award and then a Final Award, which sustained the decision to suspend and terminate plaintiff. The Board's opinion concluded that "the un-rebutted and uncontradicted evidence establishes the charges by a fair preponderance of the evidence." Consequently, the Transit Authority terminated plaintiff's employment, effective May 22, 1995.

Plaintiff subsequently withdrew both his Article 78 proceeding and his Appellate Division application for an Order to Show Cause regarding the stay issue. Instead, he commenced a proceeding pursuant to CPLR Article 75 in Supreme Court, Kings County, against defendant Transit Authority, Kiepper and Carmen Suardy, then Vice President, Labor Relations for the Transit Authority, seeking to vacate and set aside the arbitration award on four grounds: (1) the absence of authority to arbitrate because of the May 16, 1995 Order of Justice Levine staying the hearing; (2) the absence of stenographic record to review the decision; (3) the arbitrator

was not impartial; and (4) the penalty was too harsh. Plaintiff contended that the arbitrator's actions in conducting the arbitration hearing and barring the stenographer from the hearing violated his due process rights. On May 23, 1996, the Supreme Court, Kings County (Hutcherson, J.), issued an Order denying plaintiff's Article 75 application to vacate the award and granting defendants' cross-motion to confirm the arbitration award. With regard to plaintiff's first contention, Justice Hutcherson ruled, in relevant part:

> Petitioner's allegation that the arbitrator was obligated to adjourn the arbitration pending the court's determination and the request for a stay is without merit. Granting or refusing an adjournment lies within the discretion of the arbitrator *Reele v. B. Healy NY Corporation,* 54 A.D.2d 1039, and petitioner has failed to demonstrate that denial of the adjournment amounted to misconduct.

With regard to his second contention, the court ruled that:

> where the [collective bargaining agreement] provides that "No transcript of arbitration hearing shall be required," it was within the arbitrator's discretion not to allow stenographic transcription of the hearing. *See Rhinestone v. New York City Transit Authority*, 142 A.D.2d 562; *Reele v. B. Healy NY Corporation, supra.*

The court found no evidence of the partiality of the arbitrator and declined to find the penalty too harsh, noting that "where the parties have agreed to arbitration, a Court may not usurp the arbitrator's function by imposing its concepts of a just and equitable result." The court therefore concluded that "it cannot be held that the award was irrational, violative of public policy or in excess of the arbitrator's powers."

Plaintiff did not appeal this decision. Instead, he initiated the present Section 1983 action in this court on October 21, 1996, claiming that his due process rights were violated because: (1) the arbitration hearing was held without determining whether the stay issued by Justice Levine in the May 16, 1995 Order was valid; and (2) he was precluded from preserving a stenographic record of the arbitration proceeding.[2] Plaintiff seeks to void the arbitration decision on these grounds and require the Transit Authority to permit him to retire from the Transit Authority with full retirement benefits.

DISCUSSION

Qualified Immunity

Preliminarily, defendants contend that summary judgment should be granted for the individual defendants, Kiepper and Reuter, on the basis of qualified immunity. On oral argument, plaintiff withdrew his claims against Kiepper and Reuter.

Issue Preclusion

"The doctrine of collateral estoppel promotes important goals: it allows a party only one opportunity to litigate an issue thereby conserving the time and resources of the parties and the court; promotes the finality of judgments; preserves the integrity of the judicial system by eliminating inconsistent results; and ensures that a party not be able to relitigate issues already decided against it in prior litigation." *Johnson v.*

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[2] In his complaint, plaintiff also alleges that "Defendants have violated his right to equal protection of laws in that they have treated him differently from other similarly situated New York City Transit Authority employees in depriving him of his constitutional right to procedural and substantive due process of laws." Plaintiff has stated no facts to distinguish this claim from his due process claims.

Watkins, 101 F.3d 792 (2d Cir. 1996). A federal court examining the preclusive effect of a state court judgment must look to the full faith and credit statute, 28 U.S.C. § 1738 (1994):

> Such Acts, records and judicial proceedings. . . shall have the same full faith and credit in every court within the United States. . .as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Thus, a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered. *Giakoumelos V. Coughlin,* 88 F.3d 56, 59 (2d Cir. 1996); *Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984). New York issue preclusion law therefore controls the determination of whether plaintiff's Article 75 proceeding has a preclusive effect on the issues litigated in the present action.

"Under New York law, the doctrine of collateral estoppel, or issue preclusion, applies when a litigant in a prior proceeding asserts an issue of fact or law in a subsequent proceeding and (1) the issue 'has necessarily been decided in the prior action and is decisive of the present action,' and (2) there has been a 'full and fair opportunity to contest the decision now said to be controlling.'" *Giakoumelos v. Coughlin,* 88 F.3d 56, 58 (2d Cir. 1996) (citing *Schwartz v. Public Administrator,* 24 N.Y.2d 65, 71 (1969)); *Hickerson v. City of New York,* 146 F.3d 99, 104 (2d Cir. 1998). "The party asserting issue preclusion bears the burden of showing that the identical issue was previously decided, while the party against whom the doctrine is asserted bears the burden of showing the absence of a full and fair opportunity to litigate in

the prior proceeding." *Colon v. Coughlin,* 58 F.3d 865, 869 (2d Cir. 1995) (citations omitted).

From a comparison of the verified petition filed in the Article 75 proceeding and the complaint in the present Section 1983 action, it is clear that the same issues plaintiff raises here as due process claims were previously raised in identical constitutional terms. Plaintiff does not dispute that he previously raised the same constitutional issues in the Article 75 proceeding and that the Supreme Court, Kings County, decided those issues against him. Nor does he contend that the Supreme Court in the Article 75 proceeding could not hear the constitutional claims. Instead, he contends, in essence, that he did not have a full and fair opportunity to litigate the issues in the Article 75 proceeding because of the limited judicial review available in Article 75 proceedings.

Pursuant to CPLR Article 75, the only grounds on which an arbitration award can be vacated at the "behest of a party who participated in the arbitration. . .[are] that the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award, partiality of an arbitrator, that the arbitrator exceeded his power or failed to make a final and definite award, or a procedural failure that was not waived." *Silverman v. Benmor Coats, Inc.,* 61 N.Y.2d 299, 307 (1984). The grounds for vacating an arbitration award pursuant to Article 75 include a claim that the plaintiff's due process rights were violated. *Mount St. Mary' s Hospital of Niagara Falls v. Catherwood,* 26 N.Y.2d 493 (1970). Although review under Article 75 of the legal and factual substance of an arbitrator's decision is limited, plaintiff cannot demonstrate the lack of a full and fair opportunity to litigate his claims that the arbitrator engaged in misconduct rising to the level of a constitutional violation when he refused to adjourn the arbitration hearing and refused to allow plaintiff to record it. Such legal claims are clearly available in Article 75

proceedings challenging either compulsory or consensual arbitrations. *Id.; see also id.* at 513 (Fuld, J., concurring) (New York "courts now have the right to review. . .whether the [arbitrator] violated basic due process requirements in the conduct of the proceedings."). Since the identical due process issues plaintiff raises in the present action were previously raised and decided by the Supreme Court in the Article 75 proceeding, plaintiff is precluded from bringing those claims here.

CONCLUSION

The claims against the individual defendants, Kiepper and Reuter, are withdrawn. The Transit Authority's motion for summary judgment is granted. The Clerk of Court is directed to enter judgment dismissing the complaint.

SO ORDERED.

Nina Gershon
United States
District Judge

Dated: Brooklyn, New York
September 16, 1998

APPENDIX C

Summary Order of the United States Court of Appeals for the Second Circuit Dated June 4, 1999

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of June, one thousand nine hundred ninety-nine.

PRESENT:

HON. ELLSWORTH VAN GRAAFEILAND,
HON. GUIDO CALABRESI,
HON. CHESTER J. STRAUB,
Circuit Judges.

LEONARD JAWOROWSKI,

Plaintiff-Appellant,

v.

SUMMARY ORDER

NEW YORK CITY TRANSIT AUTHORITY, ALAN F. KIEPPER, as former President of New York City Transit Authority, and LAWRENCE G. REUTER, as President of the New York City Transit Authority,

Defendants-Appellees.

For Appellant: ANDREW HIRSCHHORN, Rosedale, N.Y.

For Appellee: KENNETH HOWARD SCHIFFRIN, of counsel, *for* Martin B. Schnabel, Acting General Counsel, New York City Transit Authority, Brooklyn, N.Y.

Appeal from the United States District Court for the Eastern District of New York (Nina Gershon, *Judge).*

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and hereby is AFFIRMED.

Plaintiff-Appellant Leonard Jaworowski appeals from a judgment of the United States District Court for the Eastern District of New York (Nina Gershon, *Judge)* granting summary judgment to Jaworowski's former employer, defendant-appellee New York Transit Authority.[1] Jaworowski's suit, brought pursuant to 42 U.S.C. § 1983, alleges various constitutional infirmities in an arbitration proceeding arising out of disciplinary charges brought against him by the Transit Authority. The district court ruled that Jaworowski was estopped from bringing his claims, which he had previously litigated in an action in New York state court. We affirm.

"[A] federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984). "New York law provides that an issue may not be relitigated if the identical issue was necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action." *Hickerson*

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1 Jaworowski withdrew his claims against individual defendants Alan F. Kiepper, a former President of New York City Transit Authority, and Lawrence Reuter, the current President of New York City Transit Authority, while this case was before the district court.

v. City of New York, 146 F.3d 99, 104 (2d Cir. 1998). On appeal, Jaworowski argues that collateral estoppel should not bar his current suit because the issues he now raises are not identical to the claims he asserted in the state court proceeding.

Although Jaworowski concedes that the claims he now raises were previously advanced in his state court suit, he contends that the fact that his state court action asserted additional claims means that the issues raised in the two proceedings are not identical. This argument misperceives the nature of the test described in *Hickerson.* The state court's confirmation of the arbitration award necessarily rejected *all* of the challenges that Jaworowski had made to the award. And Jaworowski admits that his § 1983 suit does not assert any claims that were not made—and therefore rejected—in the state court. That Jaworowski made *other* allegations or error that also were not accepted by the state court does not negate the fact that Jaworowski's current suit asserts only claims that the state court already rejected.

Jaworowski also contends that the claims he now asserts in his § 1983 complaint are not identical to those litigated in state court because the standards of review of arbitrations differ between New York state courts and federal courts. Specifically, according to Jaworowski, to prevail in state court he would have had to prove that the alleged due process violations rendered the arbitration irrational, while in federal court he need only show that the arbitration violated due process. This argument mistakenly conflates two different grounds for setting aside an arbitration under New York law. Although it is true that one ground for vacating an arbitration decision is to show that the award is "totally irrational," *see Board of Educ. v. Dover-Wingdale Teachers' Ass'n,* 61 N.Y.2d 913, 915, 463 N.E.2d 32, 32, 474 N.Y.S.2d 716, 716 (1984), a court applying New York law will also vacate an arbitration if it finds that the arbitration violated due

process, *see Beckman v. Greentree Securities, Inc.*, 87 N.Y.2d 566, 570, 663 N.E.2d 886, 888, 640 N.Y.S.2d 845, 847 (1996); *Republique Francaise v. Cellosilk Mfg. Co.*, 309 N.Y.2d 269, 276, 128 N.E.2d 750, 753 (1955) ("The arbitration award having been thus procured in violation. . .of due process was null and void."). Thus, contrary to Jaworowski's assertions, New York state courts do not review constitutional challenges to arbitration decisions more deferentially than do federal courts. We therefore need not decided whether, if such a disparity existed, it would provide a basis for not applying collateral estoppel to bar Jaworowski's claims.

We conclude that Jaworowski is estopped from raising his constitutional challenges to the arbitration, having already litigated these same claims in New York state court. We have carefully reviewed the record and examined each of Jaworowski's arguments. The district court's order of judgment is therefore AFFIRMED.

For the Court,

KAREN GREVE MILTON

Acting Clerk

By: Chandella G. Armstrong

Acting Operations Manager

APPENDIX D

United States Constitution, Fourteenth Amendment, due process clause thereof

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

42 USC § 1983

UNITED STATES CODE § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX F

28 USC § 1343

UNITED STATES CODE § 1343
Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

No. 99-542

FILED
NOV - 5 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LEONARD JAWOROWSKI,

Petitioner,

-against-

NEW YORK CITY TRANSIT AUTHORITY, ALAN F. KIEPPER, as former President of New York City Transit Authority, and LAWRENCE G. REUTER, as President of the New York City Transit Authority,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR AWRIT OF CERTIORARI

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Counter-Statement of Question Presented for Review

Whether the United States Court of Appeals for the Second Circuit properly applied prevailing case law in dismissing the same due process claims herein that plaintiff had previously raised in a proceeding in state court where the state court had decided those very claims against petitioner and had confirmed the arbitration award upholding petitioner's termination.

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Counter-Statement on Jurisdiction

Petitioner seeks review of a summary order of the United States Court of Appeals for the Second Circuit, entered June 4, 1999, which affirmed the order of judgment of the United States District Court for the Eastern District of New York (Nina Gershon, Judge), which had granted summary judgment to respondent New York City Transit Authority (hereinafter, "Transit Authority"), petitioner's former employer, and dismissed petitioner's complaint. Petitioner brought this action pursuant to 42 U.S.C. § 1983 alleging various constitutional infirmities in a disciplinary arbitration proceeding that upheld his termination. The district court and circuit court both concluded that petitioner is estopped from raising his constitutional challenges to the arbitration considering that the same claims had been raised and decided in the New York State court proceeding.

No. 99-542

IN THE

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LEONARD JAWOROWSKI,

Petitioner,

-against-

NEW YORK CITY TRANSIT AUTHORITY, ALAN F. KIEPPER, as former President of New York City Transit Authority, and LAWRENCE G. REUTER, as President of the New York City Transit Authority,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counter-Statement of the Case

Petitioner seeks review of a summary order of the United States Court of Appeals for the Second Circuit, entered June 4, 1999, which affirmed a judgment of the United States District

Court for the Eastern District of New York based upon the order of the Hon. Nina Gershon, dated September 18, 1998, which granted respondents' summary judgment motion and dismissed the complaint. Petitioner had brought that complaint pursuant to 42 U.S.C. § 1983 against his former employer, respondent Transit Authority, respondent Alan F. Kiepper, the Transit Authority's former President and Lawrence G. Reuter, the current Transit Authority President.[1] Plaintiff claimed alleged procedural and substantive due process violations of his First and Fourteenth Amendment constitutional rights regarding an arbitration hearing and award dated May 22, 1995 that upheld his termination as a Structure Maintainer, Group B for misappropriating Transit Authority property and receiving pay based on a falsified time record.

Specifically, petitioner claimed due process violations for the arbitration panel's failure to stay the arbitration hearing and for precluding a stenographic record of the arbitration hearing (A185).[2] However, respondents successfully argued below that the doctrine of collateral estoppel, i.e., issue preclusion, barred this action in view of the denial of petitioner's virtually identical arguments in a state court proceeding. The petition for review has now ensued.

A. Factual Background

Respondent Transit Authority is a public benefit corporation existing pursuant to New York Public Authorities Law, § 1201 et seq. for the purpose of operating transit facilities in New York City for the convenience and safety of the public. (A26). The

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[1] Plaintiff subsequently withdrew his claims against defendants Kiepper and Reuter. (A186, A189).

[2] Numbers in parentheses preceded by "A", unless otherwise indicated, refer to pages in the Joint Appendix to the Circuit Court.

Transit Authority thus performs a governmental function by such operation. New York Public Authorities Law, § 1201. (A26).

Respondent Kiepper previously served as President of respondent Transit Authority during the relevant times covered in petitioner's complaint and respondent Reuter currently serves as President of respondent Transit Authority. (A26).

Petitioner was initially appointed as a Maintainer's Helper, Group D in the Transit Authority on June 8, 1970 and was a Structure Maintainer, Group B for the Infrastructure Division of the Subways Department when dismissed from service effective May 22, 1995. (A27).

The Transit Authority notified petitioner on April 28, 1995, of his suspension without pay pending termination in view of allegations that he falsified his arrival time record on April 20, 1995 and had unauthorized possession and control of a Transit Authority cement mixer as well as other Transit Authority property such as an impact wrench and demo hammer. Those alleged actions violated Rules 2(b), 5(a), 6(b), 8(a), 10(a) and 13(b) of the Rules Governing Employees Engaged in the Operation of the New York City Transit System. (A27, A33-A41).

The Transit Authority took this disciplinary action pursuant to its collective bargaining agreement with petitioner's union, the Transport Workers Union, Local 100 (hereinafter, "TWU"). The collective bargaining agreement provides applicable disciplinary grievance and arbitration procedures in Section 2.1(C) (A27, A42-A49).

The provisions, adopted in lieu of New York Civil Service Law, Section 75, present a multistep administrative process culminating in arbitration before a Tripartite Arbitration Board whose decision is final and binding. (A27, A48-A49). Petitioner both grieved the disciplinary action and concurrently filed for

retirement with the New York City Employees Retirement System effective May 27, 1995. (A27, A50-A51).

The Step I Meeting on May 1, 1995 resulted in a decision sustaining the charges and penalty and petitioner appealed this Step I decision. (A27, A50-A51). A subsequent decision thereafter resulted on May 5, 1995 sustaining the charges and dismissal penalty and petitioner also appealed that decision. (A28, A52).

B. Procedural Background

Petitioner subsequently commenced a proceeding pursuant to New York Civil Practice Law and Rules (CPLR) Article 78 on Tuesday, May 16, 1995, eleven days after appealing the May 5, 1995 decision, and sought, *inter alia*, to stay the Tripartite Arbitration Board hearing scheduled for two days later on May 18, 1995 at 12:00 p.m. (A28). Justice Levine granted petitioner's application to the extent of ordering that the Tripartite Arbitration on May 18, 1995 at 12:00 p.m. be stayed pending the hearing of that Article 78 petition. (A28, A53-A54). Respondents therein, the Transit Authority, Kiepper, Carmen Suardy, Vice President, Labor Relations for respondent Transit Authority and Leonard Grumbach, Deputy Vice President, Labor Relations for respondent Transit Authority, appealed that show cause order the following day, May 17, 1995 and notified opposing counsel by faxed letter that such appeal restrained the stay and allowed the arbitration to proceed. (A28, A55-A63). The above respondents subsequently served a notice of intention to seek leave to appeal on May 18, which equally restrained the stay in the event an issue arose regarding the propriety of the notice of appeal. (A28, A64).

Petitioner addressed the stay issue by moving for a stay in the Appellate Division, Second Department but Justice Sullivan of

that court struck that portion of petitioner's show cause order, as indicated in the Appellate Division order. (A28, A65-A66). Instead, Justice Sullivan recognized the statutory stay respondents had already obtained and made petitioner's application returnable on Thursday, May 25, 1995 regarding "vacating the automatic stay obtained by respondents-appellants by virtue of their appeal from the order of May 16, 1995." (Emphasis added.) (A28-A29), A65-A66). Indeed, Deputy Clerk Edman of the Appellate Division stressed Justice Sullivan's belief that petitioner needed to exhaust his administrative remedies and could ultimately seek relief after the disposition of the administrative proceedings. (A29).

Consequently, the Tripartite Arbitration Board hearing proceeded on May 18, 1995 shortly after 2:00 p.m. and after rejecting petitioner's request to delay the hearing. The Board's action balanced the equities to allow the arbitration to proceed to conclusion considering that petitioner's imminent retirement on May 27, 1995 would have mooted the disciplinary proceeding. (A29).

C. Transcription Issue

The Board also rejected petitioner's application to transcribe the proceedings. Rejecting the transcription request followed the Board's own prior rulings as well as Appellate Division case law. Indeed, the Board had rejected an identical request for transcription in 1988 in the Matter of Eddie Brumfield, as indicated in the letter from then Impartial Chairman Lois A. Rappaport. (A29, A67-A70).

The relevant correspondence further reveals that the Appellate Division, Second Department had reversed Supreme Court, Richmond County and refused to allow a transcript of another Transit Authority-TWU Tripartite Arbitration hearing in

Rhinestone v. New York City Transit Authority, 142 A.D.2d 562 (1988). (A29, A69). There, the Court noted the relevant portion of the collective bargaining agreement which provided, as here (A48), that "No transcript of the arbitration hearing shall be required." (A29-A30, A48, A69). In addition, the Court upheld Arbitrator Zuccotti's ruling that "...absent the consent of the Transit Authority, he would not allow stenographic transcription of the hearing even if the petitioner were to pay for it." (A30, A69).

D. Completion of Arbitration

The Tripartite Arbitration Board completed petitioner's hearing on May 18, 1995 and thereafter issued an Interim Award and then a Final Award, both dated May 22, 1995, which sustained by majority vote the decision to suspend and terminate petitioner. (A30, A71-A77).

The Board's opinion first explained its basis for sustaining the charges:

> [T]he un-rebutted and uncontradicted evidence establishes the charges by a fair preponderance of the evidence. Grievant's attempt to impeach and discredit the IG agents' eyewitness identification must fail in the face of overwhelming direct evidence that grievant was one of the three men who removed TA property and drove it in his vehicle to Pennsylvania. Also, grievant's denial, that he did not falsify his time record by signing in at 10:00 p.m., must fail. The IG agents' testimony placed grievant on the highway at 10:00 p.m., the time he signed in and was paid for. (A30, A75).

The Board then explained its reasoning for upholding the dismissal penalty:

> Having sustained the charges, the Board finds insufficient mitigating circumstances to reduce the penalty of discharge. There is insufficient evidence to show that the Transit Authority knew of and approved grievant's action in taking/borrowing TA property. The fact that an attempt was made to cover up the time when the cement mixer was removed from TA property shows that grievant and other employees were aware that such conduct was in violation of official TA rules and regulations. The attempt to cover up the property removal by falsifying a log entry shows a clear intent of misconduct which goes beyond a misunderstanding of TA rules and regulations prohibiting misappropriation of TA property. Grievant's falsification of time records likewise is a clear intent of misconduct. Under such circumstances, the Transit Authority was within its right to conclude that such intentional misconduct and violation of TA rules amounted to theft and justified discharge. Notwithstanding, grievant's long work history, the Board cannot say that the TA's imposition of the penalty of discharge was arbitrary, capricious, unreasonable, or in violation of its own rules and regulations or the collective bargaining agreement. (A30-A31, A76).

Consequently, the Transit Authority terminated petitioner effective May 22, 1995. (A31, A78).

Petitioner's termination for receiving pay based on a falsified time record and for taking Transit Authority equipment, i.e., a cement mixer, impact wrench, and demo hammer, off Transit Authority property for personal use or benefit divested him of accrued retirement benefits pursuant to Section 13-161 of the

Administrative Code of the City of New York. (A31). Petitioner subsequently withdrew both his Article 78 proceeding and his Appellate Division application for an Order to Show Cause regarding the stay issue. (A31, A79-A80). Thereafter, petitioner initiated a proceeding in Kings County Supreme Court against respondent Transit Authority, respondent Kiepper and Carmen Suardy then Vice President, Labor Relations for respondent Authority seeking, under New York CPLR Article 75, to vacate and set aside the arbitration award herein. (A31, A81-A157). Petitioner raised the same due process grounds presently raised regarding refusal (a) to adjourn the arbitration hearing and (b) to allow stenographic transcription of the hearing. (A31, A81-A157). Respondents Transit Authority, Kiepper, and Suardy answered and counterclaimed for an order confirming the arbitration award. (A31). Justice James W. Hutcherson subsequently issued a five-page decision and order dated May 23, 1996 denying the application to vacate and granting the cross-motion to confirm the award. (A31, A158-A162). Justice Hutcherson's ruling specifically rejected the very arguments petitioner again makes in this case:

> Petitioner's allegation that the arbitrator was obligated to adjourn the arbitration pending the court's determination and the request for a stay is without merit. Granting or refusing an adjournment lies within the discretion of the arbitrator Reele v. B. Healy NY Corporation, 54 AD2d 1039, and petitioner has failed to demonstrate that denial of the adjournment amounted to misconduct. Moreover, in this instance where the CBA provides that "No transcript of arbitration hearing shall be required", it was within the arbitrator's discretion not to allow stenographic transcription of the hearing. See, Rhinestone v. New York City Transit Authority, 142 AD2d 562; Reele v. B. Healy NY Corporation, supra. (A32, A160-A161).

Petitioner did not appeal Justice Hutcherson's order and decision. (A32). Instead, he initiated this federal case. (A32, A163, A1-A12). Respondents answered and subsequently successfully moved for summary judgment on the ground that collateral estoppel, i.e., issue preclusion, bars the action. (A13-A23, A24-A162, A181-A189).

E. The Decisions Below

Judge Gershon reviewed the case law regarding the doctrine of collateral estoppel (A186-A187) and pertinently noted that:

> From a comparison of the verified petition filed in the Article 75 proceeding and the complaint in the present Section 1983 action, it is clear that the same issues plaintiff raises here as due process claims were previously raised in identical constitutional terms. Plaintiff does not dispute that he previously raised the same constitutional issues in the Article 75 proceeding and that the Supreme Court, Kings County, decided these issues against him. Nor does he contend that the Supreme Court in the Article 75 proceeding could not hear the constitutional claims. Instead, he contends, in essence, that he did not have a full and fair opportunity to litigate the issues in the Article 75 proceeding because of the limited judicial review available in Article 75 proceedings. (A187).

Judge Gershon then explained that:

> The grounds for vacating an arbitration award pursuant to Article 75 include a claim that the plaintiff's due process rights were violated. Mount St. Mary's Hospital of Niagara Falls v. Catherwood, 26 N.Y.2d 493 (1970). (A188).

Hence, she cogently concluded that:

> [P]laintiff cannot demonstrate the lack of a full and fair opportunity to litigate his claims that the arbitrator engaged in misconduct rising to the level of a constitutional violation when he refused to adjourn the arbitration hearing and refused to allow plaintiff to record it. Such legal claims are clearly available in Article 75 proceedings challenging either compulsory or consensual arbitrations. Id. [Mount St. Mary's Hospital of Niagara Falls v. Catherwood, 26 N.Y.2d 493 (1970]; see also id. at 513 (Fuld, J., concurring) (New York "courts now have the right to review ... whether the [arbitrator] violated basic due process requirements in the conduct of the proceedings."). Since the identical due process issues plaintiff raises in the present action were previously raised and decided by the Supreme Court in the Article 75 proceeding, plaintiff is precluded from bringing those claims here. (A188).

The Second Circuit Court of Appeals similarly summarized preclusionary principles:

> "[A] federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City Sch. Dist. Bd. Of Educ., 456 U.S. 75, 81 (1984). "New York law provides that an issue may not be relitigated if the identical issue was necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action." Hickerson v. City of New York, 146 F.3d 99, 104 (2d Cir. 1978).]

The Second Circuit opinion then noted that:

> The state court's confirmation of the arbitration award necessarily rejected *all* of the challenges that Jaworowski had made to the award. And Jaworowski admits that his § 1983 suit does not assert any claims that were not made-and therefore rejected-in the state court. That Jaworowski made *other* allegations of error that also were not accepted by the state court does not negate the fact that Jaworowski's current suit asserts only claims that the state court already rejected.

Finally, the Second Circuit opinion summarized New York law pertaining to setting aside an arbitration:

> Although it is true that one ground for vacating an arbitration decision is to show that the award is "totally irrational," see Board of Educ. v. Dover-Wingdale Teachers' Ass'n, 61 N.Y.2d 913, 915, 463 N.E.2d 32, 32, 474 N.Y.S.2d 716, 716 (1984), a court applying New York law will also vacate an arbitration if it finds that the arbitration violated due process, see Beckman v. Greentree Securities, Inc., 87 N.Y.2d 566, 570, 663 N.E.2d 886, 888, 640 N.Y.S.2d 845, 847 (1996); Republique Francaise v. Cellosilk Mfg. Co., 309 N.Y.2d 269, 276, 128 N.E.2d 750, 753 (1955) ("The arbitration award having been thus procured in violation...of due process was null and void."). Thus, contrary to Jaworowski's assertions, New York state courts do not review constitutional challenges to arbitration decisions more deferentially than do federal courts. We therefore need not decide whether, if such a disparity existed, it would provide a basis for not applying collateral estoppel to bar Jaworowski's claims.

Consequently, the court below held that:

...Jaworowski is estopped from raising his constitutional challenges to the arbitration, having already litigated these same claims in New York state court.

Reasons For Denying The Petition

Collateral estoppel properly applied in this case considering that the state court proceeding rejected the same claimed constitutional due process violations alleged herein and that the state proceeding afforded plaintiff a full and fair opportunity to contest the due process issues. No due process violation occurred in any event in the state court's decision. That decision rejected plaintiff's efforts to delay the arbitration hearing, especially considering his imminent retirement which would have mooted the disciplinary proceeding. In addition, the state court decision adhered to the judicially approved contractual provision excluding stenographic transcription of the arbitration hearing. Hence, the district court properly granted summary judgment and the circuit court properly affirmed.

POINT I

CASE LAW REGARDING ISSUE PRECLUSION COMPELLED DISMISSAL OF PETITIONER'S COMPLAINT

Issue preclusion analysis barred petitioner's action. The Second Circuit had explained in Hickerson v. City of New York, 146 F.3d 99, 104, 109 (1998), that:

> New York law provides that an issue may not be relitigated if the identical issue was necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action. See e.g. In re Sokol, 113 F.3d 303, 306 (2d Cir. 1997); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500-01, 478 N.Y.S.2d 823, 826-27, 467 N.E.2d 487, 490-91 (1984)....
>
> Collateral estoppel will only apply if plaintiffs had a "full and fair opportunity" in New York state court to litigate the issues that they now seek to relitigate in federal court. See In re Sokol, 113 F.3d at 306; Ryan, 62 N.Y.2d at 501, 478 N.Y.S.2d at 826, 467 N.E.2d at 490. Plaintiffs, as the parties opposing the application of collateral estoppel, bear the burden of proving that they were denied this full and fair opportunity. See In re Sokol, 113 F.3d at 306; Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 456 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985). Included among the factors to be considered are "the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, [and] the competence and expertise of counsel." [Ryan, 62 N.Y.2d at 501, 478 N.Y.S.2d at 826, 467 N.E.2d at 490].

This Court subsequently denied certiorari in Hickerson earlier this year, 119 S.Ct.. 795, 142 L. Ed.2d 658, 67 U.S.L.W. 3430 and 3434 (January 11, 1999).

These factors warranted granting summary judgment here considering that (1) the due process and transcription issues constituted the predominant basis for petitioner's special proceeding in state supreme court; (2) the special proceeding met "...the minimum demands of procedural due process" as required by Kremer v. Chemical Construction Corp., 456 U.S. 461, 483-84, 102 S.Ct. 1883, 1898-99 (1982); (3) petitioner's desire to vacate his termination and retire with a lucrative pension provided an overwhelming incentive and initiative to litigate; and (4) the voluminous materials petitioner submitted regarding the state proceeding (A81-A157) show that extensive litigation occurred by competent counsel.

Indeed, the district court recognized that

> ... it is clear that the same issues plaintiff raises here as due process claims were previously raised in identical constitutional terms. Plaintiff does not dispute that he previously raised the same constitutional issues in the Article 75 proceeding and that the Supreme Court, Kings County, decided those issues against him. (A187-emphasis added).

Consequently, petitioner's only real dispute concerns whether he had "... a full and fair opportunity to litigate the issues in the Article 75 proceeding because of the limited judicial review available in Article 75 proceedings." (A187).

However, the district court stressed that:

> The grounds for vacating an arbitration award pursuant to Article 75 include a claim that the plaintiff's due process rights were violated. Mount St. Mary's Hospital of Niagara Falls v. Catherwood, 26 N.Y.2d 493 (1970). (A188).

Furthermore, the decision in Beatus v. Gebbia, 4 F. Supp.2d 256, 260, 261 (S.D.N.Y. 1998) regarded Article 75 proceedings as providing a full and fair opportunity to contest an arbitration award and thus held that "collateral estoppel can be applied [, as here,] to a confirmed arbitration award entered as a final judgment."

Hence, the rationale in the Hickerson case equally governs this case:

> In sum, under the full faith and credit statute and New York's law of collateral estoppel, plaintiffs may not relitigate their ... claim in federal court because the same issues that are dispositive of this claim have already been decided in state court. Plaintiffs had a full and fair opportunity to litigate these issues in state court, and they raise no valid ground for barring the application of the doctrine of collateral estoppel. [146 F.3d 99, 113].

Indeed, petitioner's papers simply reiterate the very same meritless due process claims rejected by Justice Hutcherson in state court after a thorough analysis. That determination clearly negates any argument that the issues before the state court were distinguishable from the issues in the present action.

POINT II

PETITIONER WAS ACCORDED DUE PROCESS

The balancing of equities, in conjunction with relevant case law, in any event warranted both rejecting petitioner's request to delay the arbitration hearing and allowing it to proceed to conclusion. No due process problem existed considering that petitioner's retirement application would have mooted the disciplinary proceeding in view of his imminent retirement on May 27, 1995. The New York Court of Appeals has held in similar circumstances in Evans v. Monaghan, 306 N.Y. 312, 322-323 (1954), that:

> None of the petitioners was willing to postpone the effective date of his retirement. It was proper to conduct the trial with such expedition as was necessary in order to prevent their pensions from taking effect in the event that they were found guilty of these charges.

In addition, adequate state remedies, such as the special proceeding authorized by New York CPLR Article 75, were available and fully utilized by petitioner, as discussed above. Thus, the existence of such an adequate post deprivation remedy fully satisfies due process requirements, Alexander v. Cortes, 140 F.3d 406, 411 (2d Cir. 1998) (citing Hudson v. Palmer, 468 U.S. 517 [1984]).

Petitioner fundamentally errs regarding the transcription issue in failing to distinguish between hearings pursuant to New York Civil Service Law, Section 75, subdivisions 2 and 3, mandating a transcript, and arbitration hearings without a transcript pursuant to a collective bargaining agreement's disciplinary procedures adopted, as here, in lieu of New York Civil Service Law, Section 75. (A27). New York case law authorizes such

alternative disciplinary procedures to modify, supplement or replace statutory disciplinary procedures otherwise applicable to public employees, Antinore v. State of New York, 49 A.D.2d 6, 8 (4th Dept. 1975), aff'd, 40 N.Y.2d 921 (1976), Auburn Police Local 195, Council 82, AFSCME, AFL-CIO v. Helsby, 62 A.D.2d 12 (3rd Dept. 1978), aff'd, 46 N.Y.2d 1034 (1979); Dye v. New York City Transit Authority, 88 A.D.2d 899 (2d Dept. 1982), aff'd, 57 N.Y.2d 917 (1982).

Consequently, no constitutional due process violation exists for conducting arbitration proceedings without a transcript. Indeed, Justice Hutcherson's decision in Kings County Supreme Court correctly cited New York appellate case law regarding the conducting of an arbitration hearing including the transcription issue:

> Granting or refusing an adjournment lies within the discretion of the arbitrator Reele v. B. Healy NY Corporation, 54 AD2d 1039, and petitioner has failed to demonstrate that denial of the adjournment amounted to misconduct. Moreover, in this instance where the CBA provides that "No transcript of arbitration hearing shall be required", it was within the arbitrator's discretion not to allow stenographic transcription of the hearing. See, Rhinestone v. New York City Transit Authority, 142 AD2d 562; Reele v. B. Healy NY Corporation, supra. (A160-A161).

Petitioner similarly presents a meritless substantive due process claim. Such a claim results only when a government employer abuses a uniquely governmental power. Hence, the

Second Circuit decision in McClary v. O'Hare, 786 F.2d 83, 89 (2d Cir. 1986) noted that:

> ... the substantive component of the Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer.

"The substantive component of the due process clause protects citizens only from abuses of governmental authority..." Costello v. Town of Fairfield, 811 F2d 782, 787 (2d Cir. 1987) (Van Graafeiland, concurring).

Here, petitioner's disciplinary termination failed to constitute a uniquely governmental power.

The language and ruling in Sussman v. New York City Health and Hospitals Corp., 1997 WL 33496 *12 (S.D.N.Y. 1997), which cites the above cases, thus fully applies in this case: "Because defendants did not wield any authority or take any action against plaintiff that was uniquely governmental in nature, but rather took actions that any employer could take, [plaintiff's] claim for violation of substantive due process rights is dismissed."

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Brooklyn, New York
November 5, 1999

Respectfully submitted,

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APPENDIX A

Memorandum Decision of the Supreme Court of the State of New York, County of Kings (Hutcherson, J.) dated May 23, 1996

SUPREME COURT: KINGS COUNTY

In the Matter of the Application of LEONARD JAWOROWSKI,

Petitioner(s),

vs.

NEW YORK CITY TRANSIT AUTHORITY, CARMEN SUARDY, as Vice President of labor Relations and ALAN F. KIEPPER, President of the New York City Transit Authority,

Respondent(s).

TRIAL TERM, PART 25

By: Hutcherson, J.

Index No. 27172/95

In this Article 75 proceeding petitioner moves for a judgment pursuant to CPLR section 7511 vacating and setting aside the arbitration award dated May 22, 1995.

Respondent counterclaims pursuant to CPLR §7511[e] for an Order confirming the May 22, 1995 arbitration award.

Petitioner was appointed as a Maintainer's Helper June 8, 1970, with the New York City Transit Authority. On April 28, 1995, he was suspended without pay pending termination due to allegations that he falsified his arrival sheet and misappropriated Transit Authority property.

The parties proceeded through the disciplinary action pursuant to the Transit Authority's Collective Bargaining Agreement (hereinafter "CBA") with the petitioner's union the Transport Workers Union, Local 100 (hereinafter "TWU").

The petitioner grieved the disciplinary action and concurrently filed for retirement with the New York City Employees Retirement System effective May 27, 1995.

The charges and dismissal penalty were sustained through the internal step hearings.

The petitioner subsequently commenced an Article 78 proceeding on Tuesday, May 16, 1995, in order to appeal the recommended findings and penalty of termination. Petitioner sought and obtained a stay of the Tripartite Arbitration Board hearing scheduled for May 18, 1995.

Respondent appealed the Show Cause Order the following day, May 17, 1995 and notified opposing counsel by faxed letter that the appeal restrained the stay and allowed the arbitrator to proceed on May 18, 1995. Respondent served a Notice of Intention to seek leave to appeal.

In response, petitioner moved for a stay in the Appellate Division, Second Department, but that portion of the Order to Show Cause which sought to rescind the stay which restrained the stay of the May 15, 1995 arbitration proceeding was struck. The Order to Show Cause which sought to vacate the automatic stay obtained by respondent-appellant by virtue of their appeal from the Order of May 16, 1995, was made returnable on May 25, 1995.

The parties appeared on May 18, 1995 for the arbitration at which time the arbitrator allowed the arbitration hearing to proceed despite petitioner's representations that a stay was in

effect. The arbitrator also denied petitioner's application to transcribe the proceedings.

The Tripartite Arbitration Board completed petitioner's hearing on May 18, 1995 and thereafter issued an Interim Award and then Final Award, both dated May 22, 1995, which sustained by majority vote the decision to suspend and terminate the petitioner. Petitioner had been scheduled to retire on May 27, 1995.

Petitioner brings this petition to vacate and set aside the award upon the grounds of:

1. Absence of Authority to arbitrate as per the mandate of the Kings County Supreme Court issued prior to the arbitration;

2. Absence of stenographic record to review decision, in violation of petitioner's Civil Service due process rights guaranteed under State and Federal Constitutions, section 75 of the New York State Civil Service Law and under New York case law, even though petitioner appeared at the arbitration with a court reporter at his own expense; and

3. Partiality of the arbitrator.

After oral argument and due deliberation and consideration and based upon the foregoing papers, petitioner's application to vacate and to set aside the award of the arbitrator is denied and respondent's counterclaim to confirm the award is granted for the reasons stated below.

An arbitrator's award will not be set aside unless it is violative of a strong public policy, is totally irrational, or exceeds the arbitrator's power CPLR 7511[b] *Matter of Town of Callicoor [Civil Serv Employees Assn],* 70 NY2d 907;

Matter of Mohiuddin v. Khan, 197 AD2d 578; *Matter of Akers v. New York City Transit Auth*, 172 AD2d 749, 751.

Petitioner's allegation that the arbitrator was obligated to adjourn the arbitration pending the court's determination and the request for a stay is without merit. Granting or refusing an adjournment lies within the discretion of the arbitrator *Reele v. B. Healy NY Corporation*, 54 AD2d 1039, and petitioner has failed to demonstrate that denial of the adjournment amounted to misconduct. Moreover, in this instance where the CBA provides that "No transcript of arbitration hearing shall be required", it was within the arbitrator's discretion not to allow stenographic transcription of the hearing. See, *Rhinestone v. New York City Transit Authority*, 142 AD2d 562; *Reele v. B. Healy NY Corporation, supra.*

Petitioner also challenges the award based upon the alleged partiality and bias of the impartial arbitrator. Petitioner alleges that the impartial arbitrator was at one time employed by the Metropolitan Transportation Authority and the Long Island Railroad. The respondent asserts that in 1989, the impartial arbitrator was an independent contractor serving as a Hearing Referee to hear disciplinary cases pursuant to New York Civil Service Law, section 75 involving the Transit Authority and non-TWU represented employees.

It is asserted that he was selected to hear petitioner's arbitration pursuant to the CBA which provides for such selection on a rotating basis from a panel of mutually agreed chairpersons.

Partiality may be shown by actual bias or the appearance of bias from which a conflict of interest may be inferred. . . Generally, before entering upon their duties, arbitrators should disclose any relationship direct or indirect that they have with any party to the arbitration, and disclose all facts known to

them which might indicate any interest or create a presumption of bias. . .while this rule does not require an arbitrator to disclose insignificant conflicts with the parties before him. . . it does require that any substantial relationship be revealed. . . [citations omitted] *City School District of Oswego v. Oswego Classroom Teachers' Association,* 100 AD2d 13. If the parties so agree, the relationship of an arbitrator to the party selecting him or to the matters in dispute will not disqualify him *See, Siegel v. Lewis,* 40 NY2d 487, 690. Here, the impartial arbitrator was agreed upon by both the union and the NYCTA. Moreover, the arbitrator's past conduct with the respondent is insufficient to support a finding of bias or partiality.

Finally, petitioner asks that the award be vacated because the sanction of termination is too harsh. However, where the parties have agreed to arbitration, a Court may not usurp the arbitrator's function by imposing its concept of a just and equitable result *Matter of Board of Education at the Dover Union Free School District v. Dover Wingdale Teachers' Association,* 95 AD2d 497.

Here, it cannot be held that the award was irrational, violative of public policy or in excess of the arbitrator's powers.

Accordingly, petitioner's application to vacate the arbitration award is denied and respondent's cross-motion to confirm the award is granted.

This constitutes the Decision and Order of the Court.

ENTER

James W. Hutcherson, J.S.C.

APPENDIX B

Order (Gershon, J.) of the United States District Court, Eastern District of New York Dated September 16, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEONARD JAWOROWSKI,

Plaintiff,

ORDER
96 CV 5142(NG)

-against-

NEW YORK CITY TRANSIT AUTHORITY, ALAN F. KIEPPER, as former President of New York City Transit Authority, and LAWRENCE REUTER, as President of New York City Transit Authority,

Defendants.

GERSHON, United States District Judge:

Plaintiff Leonard Jaworowski brings this action pursuant to 42 U.S.C. § 1983, alleging violations of his rights to due process and equal protection of the laws with regard to a May 18, 1995 arbitration hearing and May 22, 1995 arbitration award that upheld his termination from the New York City Transit Authority ("Transit Authority"). Defendants, Transit Authority, Alan F. Kiepper, as former President of the Transit Authority and Lawrence Reuter, as present President of the Transit Authority, move to dismiss the complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that plaintiff's previous action pursuant to New York

Civil Practice Law and Rules ("CPLR") Article 75 bars this action, and that the individual defendants, Kiepper and Reuter, are entitled to qualified immunity.

BACKGROUND

The following facts are undisputed.[1] Plaintiff had worked for the Transit Authority since June 8, 1970, most recently as a "Structure Maintainer" for the Infrastructure Division of the Subways Department. On April 28, 1997, the Transit Authority notified plaintiff of his suspension without pay pending termination because of allegations that he falsified his arrival time record on April 20, 1995 and that he had unauthorized possession and control of a Transit Authority cement mixer as well as other Transit Authority property such as an impact wrench and a "demo hammer." Plaintiff appealed this disciplinary action pursuant to the collective bargaining agreement between plaintiff's union and the Transit Authority. That agreement provided plaintiff a multi-step administrative appeal process. Plaintiff also filed for retirement with the New York City Employees Retirement system, to be effective May 27, 1995.

The Step 1 meeting resulted in a May 1, 1995 decision sustaining the disciplinary charges and penalty of suspension and termination. Plaintiff appealed this decision, which was sustained at the Step 2 meeting. On plaintiff's further appeal, a hearing before the Tripartite Arbitration Board, the last step in the administrative process, was scheduled for May 18, 1995.

Two days before the scheduled hearing, plaintiff commenced a proceeding pursuant to CPLR Article 78 seeking to appeal the Step 2 decision and, in the interim, stay the final arbitration hearing of the Tripartite Arbitration Board. On May

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[1] By agreement, there has been no discovery in this case.

16, 1995, the Supreme Court, Kings County (Levine, J.), signed plaintiff's Order to Show Cause and stayed the arbitration hearing scheduled for May 18, 1995. The next day, defendants filed a Notice of Appeal of that Order. Defendants, in a May 17, 1995 letter, informed plaintiff that their Notice of Appeal "stays the appealed order. . .and thus any effect which attached to Justice Levine's order has now been stayed." The letter continued:

> Consequently, the Transit Authority will proceed at tomorrow's scheduled Tripartite Arbitration Board hearing regarding Mr. Jaworowski's disciplinary charges. Mr. Jaworowski and his representative(s) are expected to appear, at the arbitration hearing. . . The Transit Authority will proceed even in Mr. Jaworowski's absence, and if he does not appear then the charges will be sustained and the appealed dismissal penalty implemented pursuant to the collective bargaining agreement.

On the morning of May 18, 1995, the date of the scheduled arbitration hearing, the parties appeared at the Appellate Division, Second Department, in order to resolve the issue of whether defendants' Notice of Appeal stayed the effect of the May 16, 1995 Order which stayed the arbitration hearing scheduled for later that day. Defendants served a handwritten Notice of Intention to Appeal the May 16, 1995 Order, and plaintiff filed another proposed Order to Show Cause with the Appellate Division, seeking again to stay the May 18, 1995 arbitration hearing. Justice Thomas P. Sullivan of the Appellate Division, Second Department, signed the Order to Show Cause "why an order should not be made vacating the automatic stay obtained by respondents-appellants by virtue of their appeal from the order of May 16, 1995" and expressly denied plaintiff's request to the Appellate Division

for a stay of the May 18, 1995 Tripartite Arbitration Board hearing.

The Tripartite Arbitration Board hearing proceeded later that day at 2:00 p.m. Plaintiff, appearing with counsel, presented the Board with the May 16, 1995 Order of Justice Levine and requested an adjournment of the arbitration hearing until the May 19, 1995 return date of that Order for the purpose of determining whether a stay of the proceeding existed. The request for an adjournment was denied. Plaintiff also requested that a stenographer, whom he had already procured at his own expense and was present, be allowed to transcribe the proceedings. This request was also denied.

The hearing was then held. Plaintiff, represented by counsel, cross-examined witnesses of the Transit Authority and presented witnesses of his own. On May 22, 1995, the Tripartite Arbitration Board issued an Interim Award and then a Final Award, which sustained the decision to suspend and terminate plaintiff. The Board's opinion concluded that "the un-rebutted and uncontradicted evidence establishes the charges by a fair preponderance of the evidence." Consequently, the Transit Authority terminated plaintiff's employment, effective May 22, 1995.

Plaintiff subsequently withdrew both his Article 78 proceeding and his Appellate Division application for an Order to Show Cause regarding the stay issue. Instead, he commenced a proceeding pursuant to CPLR Article 75 in Supreme Court, Kings County, against defendant Transit Authority, Kiepper and Carmen Suardy, then Vice President, Labor Relations for the Transit Authority, seeking to vacate and set aside the arbitration award on four grounds: (1) the absence of authority to arbitrate because of the May 16, 1995 Order of Justice Levine staying the hearing; (2) the absence of stenographic record to review the decision; (3) the arbitrator

was not impartial; and (4) the penalty was too harsh. Plaintiff contended that the arbitrator's actions in conducting the arbitration hearing and barring the stenographer from the hearing violated his due process rights. On May 23, 1996, the Supreme Court, Kings County (Hutcherson, J.), issued an Order denying plaintiff's Article 75 application to vacate the award and granting defendants' cross-motion to confirm the arbitration award. With regard to plaintiff's first contention, Justice Hutcherson ruled, in relevant part:

> Petitioner's allegation that the arbitrator was obligated to adjourn the arbitration pending the court's determination and the request for a stay is without merit. Granting or refusing an adjournment lies within the discretion of the arbitrator *Reele v. B. Healy NY Corporation*, 54 A.D.2d 1039, and petitioner has failed to demonstrate that denial of the adjournment amounted to misconduct.

With regard to his second contention, the court ruled that:

> where the [collective bargaining agreement] provides that "No transcript of arbitration hearing shall be required," it was within the arbitrator's discretion not to allow stenographic transcription of the hearing. *See Rhinestone v. New York City Transit Authority*, 142 A.D.2d 562; *Reele v. B. Healy NY Corporation, supra.*

The court found no evidence of the partiality of the arbitrator and declined to find the penalty too harsh, noting that "where the parties have agreed to arbitration, a Court may not usurp the arbitrator's function by imposing its concepts of a just and equitable result." The court therefore concluded that "it cannot be held that the award was irrational, violative of public policy or in excess of the arbitrator's powers."

Plaintiff did not appeal this decision. Instead, he initiated the present Section 1983 action in this court on October 21, 1996, claiming that his due process rights were violated because: (1) the arbitration hearing was held without determining whether the stay issued by Justice Levine in the May 16, 1995 Order was valid; and (2) he was precluded from preserving a stenographic record of the arbitration proceeding.[2] Plaintiff seeks to void the arbitration decision on these grounds and require the Transit Authority to permit him to retire from the Transit Authority with full retirement benefits.

DISCUSSION

Qualified Immunity

Preliminarily, defendants contend that summary judgment should be granted for the individual defendants, Kiepper and Reuter, on the basis of qualified immunity. On oral argument, plaintiff withdrew his claims against Kiepper and Reuter.

Issue Preclusion

"The doctrine of collateral estoppel promotes important goals: it allows a party only one opportunity to litigate an issue thereby conserving the time and resources of the parties and the court; promotes the finality of judgments; preserves the integrity of the judicial system by eliminating inconsistent results; and ensures that a party not be able to relitigate issues already decided against it in prior litigation." *Johnson v.*

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[2] In his complaint, plaintiff also alleges that "Defendants have violated his right to equal protection of laws in that they have treated him differently from other similarly situated New York City Transit Authority employees in depriving him of his constitutional right to procedural and substantive due process of laws." Plaintiff has stated no facts to distinguish this claim from his due process claims.

Watkins, 101 F.3d 792 (2d Cir. 1996). A federal court examining the preclusive effect of a state court judgment must look to the full faith and credit statute, 28 U.S.C. § 1738 (1994):

> Such Acts, records and judicial proceedings. . . shall have the same full faith and credit in every court within the United States. . .as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Thus, a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered. *Giakoumelos V. Coughlin,* 88 F.3d 56, 59 (2d Cir. 1996); *Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984). New York issue preclusion law therefore controls the determination of whether plaintiff's Article 75 proceeding has a preclusive effect on the issues litigated in the present action.

"Under New York law, the doctrine of collateral estoppel, or issue preclusion, applies when a litigant in a prior proceeding asserts an issue of fact or law in a subsequent proceeding and (1) the issue 'has necessarily been decided in the prior action and is decisive of the present action,' and (2) there has been a 'full and fair opportunity to contest the decision now said to be controlling.'" *Giakoumelos v. Coughlin,* 88 F.3d 56, 58 (2d Cir. 1996) (citing *Schwartz v. Public Administrator,* 24 N.Y.2d 65, 71 (1969)); *Hickerson v. City of New York,* 146 F.3d 99, 104 (2d Cir. 1998). "The party asserting issue preclusion bears the burden of showing that the identical issue was previously decided, while the party against whom the doctrine is asserted bears the burden of showing the absence of a full and fair opportunity to litigate in

the prior proceeding." *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995) (citations omitted).

From a comparison of the verified petition filed in the Article 75 proceeding and the complaint in the present Section 1983 action, it is clear that the same issues plaintiff raises here as due process claims were previously raised in identical constitutional terms. Plaintiff does not dispute that he previously raised the same constitutional issues in the Article 75 proceeding and that the Supreme Court, Kings County, decided those issues against him. Nor does he contend that the Supreme Court in the Article 75 proceeding could not hear the constitutional claims. Instead, he contends, in essence, that he did not have a full and fair opportunity to litigate the issues in the Article 75 proceeding because of the limited judicial review available in Article 75 proceedings.

Pursuant to CPLR Article 75, the only grounds on which an arbitration award can be vacated at the "behest of a party who participated in the arbitration. . .[are] that the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award, partiality of an arbitrator, that the arbitrator exceeded his power or failed to make a final and definite award, or a procedural failure that was not waived." *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 307 (1984). The grounds for vacating an arbitration award pursuant to Article 75 include a claim that the plaintiff's due process rights were violated. *Mount St. Mary' s Hospital of Niagara Falls v. Catherwood*, 26 N.Y.2d 493 (1970). Although review under Article 75 of the legal and factual substance of an arbitrator's decision is limited, plaintiff cannot demonstrate the lack of a full and fair opportunity to litigate his claims that the arbitrator engaged in misconduct rising to the level of a constitutional violation when he refused to adjourn the arbitration hearing and refused to allow plaintiff to record it. Such legal claims are clearly available in Article 75

proceedings challenging either compulsory or consensual arbitrations. *Id.; see also id.* at 513 (Fuld, J., concurring) (New York "courts now have the right to review. . .whether the [arbitrator] violated basic due process requirements in the conduct of the proceedings."). Since the identical due process issues plaintiff raises in the present action were previously raised and decided by the Supreme Court in the Article 75 proceeding, plaintiff is precluded from bringing those claims here.

CONCLUSION

The claims against the individual defendants, Kiepper and Reuter, are withdrawn. The Transit Authority's motion for summary judgment is granted. The Clerk of Court is directed to enter judgment dismissing the complaint.

SO ORDERED.

Nina Gershon
United States
District Judge

Dated: Brooklyn, New York
September 16, 1998

APPENDIX C

Summary Order of the United States Court of Appeals for the Second Circuit Entered June 4, 1999

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of June, one thousand nine hundred ninety-nine.

PRESENT:

HON. ELLSWORTH VAN GRAAFEILAND,
HON. GUIDO CALABRESI,
HON. CHESTER J. STRAUB,
Circuit Judges.

LEONARD JAWOROWSKI,

Plaintiff-Appellant,

v.

SUMMARY ORDER

NEW YORK CITY TRANSIT AUTHORITY, ALAN F. KIEPPER, as former President of New York City Transit Authority, and LAWRENCE G. REUTER, as President of the New York City Transit Authority,

Defendants-Appellees.

For Appellant: ANDREW HIRSCHHORN, Rosedale, N.Y.

For Appellee: KENNETH HOWARD SCHIFFRIN, of counsel, *for* Martin B. Schnabel, Acting General Counsel, New York City Transit Authority, Brooklyn, N.Y.

Appeal from the United States District Court for the Eastern District of New York (Nina Gershon, *Judge).*

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and hereby is AFFIRMED.

Plaintiff-Appellant Leonard Jaworowski appeals from a judgment of the United States District Court for the Eastern District of New York (Nina Gershon, *Judge)* granting summary judgment to Jaworowski's former employer, defendant-appellee New York Transit Authority.[1] Jaworowski's suit, brought pursuant to 42 U.S.C. § 1983, alleges various constitutional infirmities in an arbitration proceeding arising out of disciplinary charges brought against him by the Transit Authority. The district court ruled that Jaworowski was estopped from bringing his claims, which he had previously litigated in an action in New York state court. We affirm.

"[A] federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984). "New York law provides that an issue may not be relitigated if the identical issue was necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action." *Hickerson*

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1 Jaworowski withdrew his claims against individual defendants Alan F. Kiepper, a former President of New York City Transit Authority, and Lawrence Reuter, the current President of New York City Transit Authority, while this case was before the district court.

v. City of New York, 146 F.3d 99, 104 (2d Cir. 1998). On appeal, Jaworowski argues that collateral estoppel should not bar his current suit because the issues he now raises are not identical to the claims he asserted in the state court proceeding.

Although Jaworowski concedes that the claims he now raises were previously advanced in his state court suit, he contends that the fact that his state court action asserted additional claims means that the issues raised in the two proceedings are not identical. This argument misperceives the nature of the test described in *Hickerson*. The state court's confirmation of the arbitration award necessarily rejected *all* of the challenges that Jaworowski had made to the award. And Jaworowski admits that his § 1983 suit does not assert any claims that were not made—and therefore rejected—in the state court. That Jaworowski made *other* allegations of error that also were not accepted by the state court does not negate the fact that Jaworowski's current suit asserts only claims that the state court already rejected.

Jaworowski also contends that the claims he now asserts in his § 1983 complaint are not identical to those litigated in state court because the standards of review of arbitrations differ between New York state courts and federal courts. Specifically, according to Jaworowski, to prevail in state court he would have had to prove that the alleged due process violations rendered the arbitration irrational, while in federal court he need only show that the arbitration violated due process. This argument mistakenly conflates two different grounds for setting aside an arbitration under New York law. Although it is true that one ground for vacating an arbitration decision is to show that the award is "totally irrational," *see Board of Educ. v. Dover-Wingdale Teachers' Ass'n*, 61 N.Y.2d 913, 915, 463 N.E.2d 32, 32, 474 N.Y.S.2d 716, 716 (1984), a court applying New York law will also vacate an arbitration if it finds that the arbitration violated due

process, *see Beckman v. Greentree Securities, Inc.*, 87 N.Y.2d 566, 570, 663 N.E.2d 886, 888, 640 N.Y.S.2d 845, 847 (1996); *Republique Francaise v. Cellosilk Mfg. Co.*, 309 N.Y.2d 269, 276, 128 N.E.2d 750, 753 (1955) ("The arbitration award having been thus procured in violation. . .of due process was null and void."). Thus, contrary to Jaworowski's assertions, New York state courts do not review constitutional challenges to arbitration decisions more deferentially than do federal courts. We therefore need not decide whether, if such a disparity existed, it would provide a basis for not applying collateral estoppel to bar Jaworowski's claims.

We conclude that Jaworowski is estopped from raising his constitutional challenges to the arbitration, having already litigated these same claims in New York state court. We have carefully reviewed the record and examined each of Jaworowski's arguments. The district court's order of judgment is therefore AFFIRMED.

For the Court,

KAREN GREVE MILTON

Acting Clerk

By: Chandella G. Armstrong

Acting Operations Manager